

## **Coimisiún na Meán e-Commerce Compliance Strategy**

Relating to Online Safety Codes, Online Safety Guidance Materials & Advisory Notices

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## E-Commerce Compliance Strategy

### A. Background

The E-Commerce Directive<sup>1</sup> was transposed into Irish law by S.I. No. 68 of 2003 - European Communities (Directive 2000/31/EC) Regulations 2003 (the “**2003 Regulations**”). Regulations 16 to 18 of the 2003 Regulations<sup>2</sup> exempt intermediary service providers from liability for unlawful content transmitted or uploaded by a user. There are some conditions attached to this, such as that the provider must not have actual knowledge of the unlawful nature of the content and must remove it expeditiously if it becomes aware of the unlawful activity.

Article 15 of the E-Commerce Directive<sup>3</sup> provides that Member States must not impose a general obligation on intermediary service providers to monitor the information which they transmit or store, nor may Member States impose a general obligation actively to seek facts or circumstances indicating illegal activity.

Under the Broadcasting Act 2009, as amended, Coimisiún na Meán (the “**Commission**”) may adopt online safety codes<sup>4</sup> and apply them to designated online services.<sup>5</sup> The Commission may also prepare online safety guidance materials and advisory notices.<sup>6</sup>

Providers of designated online services are entitled to benefit from the exemptions of liability under Regulations 16 to 18 of the 2003 Regulations, and from the prohibition on Member States imposing obligations covered by Article 15 of the E-Commerce Directive.

Section 139ZF<sup>7</sup> of the Broadcasting Act 2009, as amended requires the Commission to prepare an e-Commerce Compliance Strategy setting out its approach to ensuring that online safety codes, online safety guidance materials and advisory notices are consistent with Regulations 16-18 of the 2003 Regulations and Article 15 of the E-Commerce Directive.

This e-Commerce Compliance Strategy sets out the Commission’s approach, as required by S139ZF. It does not contain the specific text of provisions that might be included in online safety codes, online safety guidance or advisory notices: specific text will be developed and, where appropriate, consulted on in the context of each online safety code, safety materials or advisory notice.

With effect from 17 February 2024, the relevant articles of the E-Commerce Directive will be replaced by Articles 4, 5, 6 and 8 of the Digital Services Act.<sup>8</sup> There is no material change in the provisions.

This e-Commerce Compliance Strategy therefore also sets out the Commission’s approach to ensuring that online safety codes, online safety guidance materials and advisory notices are consistent with Articles 4, 5, 6 and 8 of the Digital Services Act.

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<sup>1</sup> Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

<sup>2</sup> See Appendix for the full text of Regulations 16-18.

<sup>3</sup> See Appendix for the full text of Article 15.

<sup>4</sup> Section 139K.

<sup>5</sup> Section 139L.

<sup>6</sup> Section 139Z.

<sup>7</sup> See Appendix for the full text of Section 139ZF.

<sup>8</sup> Regulation (EU) 2022/2065 on a Single Market For Digital Services and amending Directive 2000/31/EC.

## **B. Approach to consistency with exemptions from liability**

1. Failure to comply with an online safety code is a contravention which can result in a designated service provider becoming liable to an administrative financial sanction. However, failures to comply with online safety guidance materials or advisory notices do not, in themselves, amount to contraventions.
2. Online safety codes, online safety guidance materials and advisory notices will therefore not contain any provision which makes it a contravention for a designated service provider to transmit or host unlawful content, as long as the provider complies with the conditions in Regulations 16 to 18 of the 2003 Regulations (or the corresponding conditions in Article 4, 5 and 6 of the Digital Services Act). Nothing in this Strategy or any online safety codes, online safety guidance materials or advisory notices will affect providers' ability to avail of the protections afforded by Article 7 of the Digital Services Act.
3. In order to remove any doubt, each online safety code will contain a provision to the effect that, notwithstanding any other provision of the online safety code, a designated service provider shall not be guilty of a contravention by reason only of the presence on its service of unlawful content:
  - a. in the case of hosting activities, provided the conditions of Regulation 18 of the 2003 Regulations/Article 6 of the Digital Services Act are satisfied;
  - b. in the case of caching activities, provided the conditions of Regulation 17 of the 2003 Regulations/Article 5 of the Digital Services Act are satisfied; and
  - c. in the case of a mere conduit, provided the conditions of Regulation 16 of the 2003 Regulations/Article 4 of the Digital Services Act are satisfied.
4. Subject to the principles established in paragraphs 2 and 3, online safety codes may contain provisions that make it a contravention not to remove unlawful content expeditiously once the provider becomes aware of the unlawful nature of the content, and may further specify what would be regarded as expeditious in particular cases.
5. Subject to the principles established in paragraphs 2 and 3, online safety codes may contain provisions that require providers to take measures that reduce the risk of unlawful content on their services. Failure to implement those measures may amount to a contravention.

## **C. Approach to consistency with Article 15 of the e-Commerce Directive / Article 8 of the Digital Services Act**

6. The Commission will not include any provision in an online safety code, online safety guidance materials or an advisory notice ("**Relevant Provision**") that necessitates general monitoring of content or generally taking active steps to seek facts or circumstances indicating illegal activity.
7. The Commission may adopt a Relevant Provision which can be complied with, at the option of the provider, either by general monitoring or in other ways.
8. The Commission may adopt a Relevant Provision that necessitates limited monitoring that does not amount to a general monitoring obligation.
9. The Commission may adopt a Relevant Provision that specifies particular circumstances in which

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designated service providers must take active steps to seek facts or circumstances indicating illegal activity.

## **D. Procedural matters**

10. In developing Relevant Provisions, the Commission will satisfy itself that the proposed provisions are consistent with the approach outlined in paragraphs 2 to 9 above.
11. When consulting on a draft of an online safety code, online safety guidance materials or an advisory notice, the Commission will invite respondents' views on whether they contain provisions that are inconsistent with liability exemptions in Regulations 16 to 18 of the 2003 Regulations (or Articles 4, 5 or 6 of the Digital Services Act) or inconsistent with Article 15 of the E-Commerce Directive (or Article 8 of the Digital Services Act).
12. Respondents will be invited to clearly demonstrate how, in their opinion, a provision imposes any such obligation on them. The Commission will consider all responses received in respect of the question and may, if it considers appropriate, update the Relevant Provision of the draft online safety code, guidance material or advisory notice accordingly, to account for the respondents' views.
13. In its response to any consultation accompanying a final version of an online safety code, online safety guidance materials or advisory notice, the Commission will explicitly confirm that it is satisfied that the final version:
  - a. does not contain any provision which makes it a contravention for a designated service provider to transmit or host unlawful content, as long as they comply with the conditions in Regulations 16 to 18 of the 2003 Regulations (or the corresponding conditions in Article 4, 5 and 6 of the Digital Services Act); and
  - b. does not contain any provision that necessitates general monitoring of content or generally taking active steps to seek facts or circumstances indicating illegal activity.

## Appendix

**This Appendix contains the key legislative provisions that are relevant in the context of the Commission’s e-Commerce Compliance Strategy**

### **A. Regulations 16 to 18 of the 2003 Regulations**

#### **Regulation 16**

##### **Liability of intermediary service providers - “mere conduit.”**

(1) An intermediary service provider shall not be liable for information transmitted by him or her in a communication network if —

(a) the information has been provided to him or her by a recipient of a relevant service provided by him or her (being a service consisting of the transmission in a communication network of that information), or

(b) a relevant service provided by him or her consists of the provision of access to a communication network,

and, in either case, the following conditions are complied with —

(i) the intermediary service provider did not initiate the transmission,

(ii) the intermediary service provider did not select the receiver of the transmission, and

(iii) the intermediary service provider did not select or modify the information contained in the transmission.

(2) References in paragraph (1) to an act of transmission and of provision of access include references to the automatic, intermediate and transient storage of the information transmitted in so far as this takes place for the sole purpose of carrying out the transmission in the communications network, and provided that the information is not stored for any period longer than is reasonably necessary for the transmission.

(3) This Regulation shall not affect the power of any court to make an order against an intermediary service provider requiring the provider not to infringe, or to cease to infringe, any legal rights.

#### **Regulation 17 Caching.**

(1) An intermediary service provider shall not be liable for the automatic intermediate and temporary storage of information which is performed for the sole purpose of making more efficient that information’s onward transmission to other users of the service upon their request, if —

(a) that storage is done in the context of the provision of a relevant service by the relevant service provider consisting of the transmission in a communication network of information provided by a recipient of that service,

and

(b) the following conditions are complied with —

(i) the intermediary service provider does not modify the information,

- (ii) the intermediary service provider complies with conditions relating to access to the information,
- (iii) the intermediary service provider complies with any rules regarding the updating of the information that have been specified in a manner widely recognised and used by industry,
- (iv) the intermediary service provider does not interfere with the lawful use of technology, widely recognised and used by industry to obtain data on the use of the information, and
- (v) the intermediary service provider acts expeditiously to remove or disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.

(2) This Regulation shall not affect the power of any court to make an order against an intermediary service provider requiring the provider not to infringe, or to cease to infringe, any legal rights.

## **Regulation 18**

### **Hosting.**

(1) An intermediary service provider who provides a relevant service consisting of the storage of information provided by a recipient of the service shall not be liable for the information stored at the request of that recipient if —

- (a) the intermediary service provider does not have actual knowledge of the unlawful activity concerned and, as regards claims for damages, is not aware of facts or circumstances from which that unlawful activity is apparent, or
- (b) the intermediary service provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

(2) Paragraph (1) shall not apply where the recipient of the service is acting under the authority or the control of the intermediary service provider referred to in that paragraph.

(3) This Regulation shall not affect the power of any court to make an order against an intermediary service provider requiring the provider not to infringe, or to cease to infringe, any legal rights.

## **B. Article 15 of the E-Commerce Directive**

### **No general obligation to monitor**

1. Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.

2. Member States may establish obligations for information society service providers promptly to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements.

## C. The Digital Services Act

### CHAPTER II of Regulation 2022/2065 -LIABILITY OF PROVIDERS OF INTERMEDIARY SERVICES

#### Article 4

##### 'Mere conduit'

1. Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, the service provider shall not be liable for the information transmitted or accessed, on condition that the provider:

- a) does not initiate the transmission;
- b) does not select the receiver of the transmission; and
- c) does not select or modify the information contained in the transmission.

2. The acts of transmission and of provision of access referred to in paragraph 1 shall include the automatic, intermediate and transient storage of the information transmitted in so far as this takes place for the sole purpose of carrying out the transmission in the communication network, and provided that the information is not stored for any period longer than is reasonably necessary for the transmission.

3. This Article shall not affect the possibility for a judicial or administrative authority, in accordance with a Member State's legal system, to require the service provider to terminate or prevent an infringement.

#### Article 5

##### 'Caching'

1. Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, the service provider shall not be liable for the automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient or more secure the information's onward transmission to other recipients of the service upon their request, on condition that the provider:

- a) does not modify the information;
- b) complies with conditions on access to the information;
- c) complies with rules regarding the updating of the information, specified in a manner widely recognised and used by industry;
- d) does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information; and
- e) acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a judicial or an administrative authority has ordered such removal or disablement.

2. This Article shall not affect the possibility for a judicial or administrative authority, in accordance with a Member State's legal system, to require the service provider to terminate or prevent an infringement.

## Article 6

### Hosting

1. Where an information society service is provided that consists of the storage of information provided by a recipient of the service, the service provider shall not be liable for the information stored at the request of a recipient of the service, on condition that the provider:
  - a) does not have actual knowledge of illegal activity or illegal content and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or illegal content is apparent; or
  - b) upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the illegal content.
2. Paragraph 1 shall not apply where the recipient of the service is acting under the authority or the control of the provider.
3. Paragraph 1 shall not apply with respect to the liability under consumer protection law of online platforms that allow consumers to conclude distance contracts with traders, where such an online platform presents the specific item of information or otherwise enables the specific transaction at issue in a way that would lead an average consumer to believe that the information, or the product or service that is the object of the transaction, is provided either by the online platform itself or by a recipient of the service who is acting under its authority or control.
4. This Article shall not affect the possibility for a judicial or administrative authority, in accordance with a Member State's legal system, to require the service provider to terminate or prevent an infringement.

## Article 7

### Voluntary own-initiative investigations and legal compliance

Providers of intermediary services shall not be deemed ineligible for the exemptions from liability referred to in Articles 4, 5 and 6 solely because they, in good faith and in a diligent manner, carry out voluntary own-initiative investigations into, or take other measures aimed at detecting, identifying and removing, or disabling access to, illegal content, or take the necessary measures to comply with the requirements of Union law and national law in compliance with Union law, including the requirements set out in this Regulation.

## Article 8

### No general monitoring or active fact-finding obligations

No general obligation to monitor the information which providers of intermediary services transmit or store, nor actively to seek facts or circumstances indicating illegal activity shall be imposed on those providers.